IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-198

HENRY ANSELMO GUTIERREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

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TO: Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Henry Anselmo Gutierrez, hereby petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Judicial Circuit which affirmed the Judgment of the United States District Court, District of Colorado, convicting the Petitioner of conspiring to violate Title 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2, all in violation of 21 U.S.C. §846

and of intentionally and knowingly distributing and aiding and abetting in the distribution of a quantity of heroin in violation of 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals has not been reported in the Federal Reporter system yet. A copy of the opinion is appended to this Petition (Appendix A). The Court's order denying Petitioner's Motion for a Rehearing is also appended hereto (Appendix B).

JURISDICTION

The order sought to be reviewed was made and entered on May 4, 1978. An order denying a timely Petition for Rehearing was made and entered on June 30, 1978. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED FOR REVIEW

Whether the District Court erred in admitting as evidence a Cashiers Check Request and a Cashiers Check, Exhibits 34 and 35, over the Defendant's objections as to, (a) Lateness of discovery, (b) Relevancy.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence

Rule 104 Preliminary Questions

(a) *Questions of Admissibility Generally*

"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy Conditioned on Fact*

"When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Rule 901 Requirement of Authentication or Identification

(a) *General Provision*

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in questions is what its proponent claims.

(b) *Illustrations*

"By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

. . . .

Federal Rules of Criminal Procedure, Rule 16 Discovery and Inspection

(a) Disclosure of evidence by the government

(1) Information subject to disclosure

(C) *Documents and tangible objects.* Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

. . . (d) Regulation of discovery

(1) *Protective and modifying orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Failure to comply with a request.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

STATEMENT OF THE CASE

(All references to the record below will be by Volume number followed by page number.)

On October 13, 1976, Defendant Gutierrez was indicted in the United States District Court for the District of Colorado on three separate counts alleging as follows:

COUNT #1 . . . That between May, 1976 to October 6, 1976, Defendant conspired with others specifically named in the indictment to violate Title 21, U.S.C. §841 (a) (1) and Title 18 U.S.C. §2 and that the purpose of the conspiracy was to distribute heroin;

COUNT #2 . . . That on or about September 7, 1976, knowing and intentionally distributed heroin in violation of Title 21, U.S.C. §841 (a) (1) and Title 18, U.S.C. §2;

COUNT #3 . . . That on or about September 29, 1976, the Defendant did knowingly and intentionally distribute heroin in violation of Title 21, U.S.C. §841 (a) (1) and Title 18, U.S.C. §2.

Gutierrez was indicted along with co-defendants Edward Zamora, Anthony Murillo, Mose Trujillo, James Quintana and Isaac Ruybalid. Prior to trial, Murillo and Trujillo entered pleas of guilty on other counts and the counts connected with Gutierrez were dismissed. Also prior to trial, co-defendant Quintana and Ruybalid fled the jurisdiction and were unavailable for trial.

On November 22, 1976, defendant Gutierrez was arraigned and entered a plea of not guilty on all counts. On December 6, 1976, Gutierrez filed Motions, including a Motion for Discovery, Inspection and Disclosure.

Trial was scheduled for February 14, 1977.

On Friday, February 11, 1977, Gutierrez's counsel, William L. Keating, was informed by the United States Attorney that new evidence had been obtained. This evidence being the $20,000 Cashiers Check drawn on the National City Bank of Denver by a person using the name,

Henry Gutierrez and sent to one Margarita Sandoval in Culiacan, Mexico. (See Volume VII)

A hearing was held before Judge Finesilver on February 11, 1977, at which time counsel informed the Court that they would object to the admission of this evidence at trial because of the lateness of the discovery and also because of the lack of relevancy. The Court reserved ruling on this issue and said that the issue would be dealt with at trial. (VII-12,13)

At this hearing, the Court also denied Gutierrez's Motion for a Continuance. This motion had been previously filed on the grounds that Isaac Ruybalid was a material witness to the case, that his attendance at the trial had been sought by Gutierrez through means of a subpoena but that the attempts to secure his attendance at the trial had been unsuccessful. No record was made of this hearing.

At trial, various undercover agents of the Drug Enforcement Administration testified concerning their contacts with the alleged co-conspirators and with defendant Gutierrez. Agent Michael Vigil testified that he was told by several alleged co-conspirators that Henry Gutierrez was the source of the heroin which was being purchased. (II-42)

Agent Vigil also testified that co-defendant Ruybalid told him that the source of defendant Gutierrez's heroin was in Culiacan, Mexico. (II-136-138) At no time were there any direct purchases of heroin from defendant Gutierrez to anyone nor any delivery of heroin from defendant Gutierrez to anyone.

On the fifth day of trial, February 18, 1977, the United States Attorney presented evidence regarding the Cashiers Check and Cashiers Check Request form. This evidence was taken outside of the presence of the jury.

Gordon Masterson, Vice President and cashier at National City Bank in Denver was called to testify. He identified Exhibit #34 as a Cashiers Check drawn in the amount of $20,000 on the National City Bank. He testified that the check had been paid by the bank. He identified Exhibit #35 as the Cashiers Check Request made in connection with Exhibit #34. The check was drawn by a person who used the name "Henry Gutierrez". (VI-4-10)

Pauline Mathias, testified that she was a teller at the National City Bank. She identified Exhibit #35 as being drawn at her teller window. (VI-22) She was unable to identify the defendant, Henry Gutierrez as having participated in obtaining that check and in fact, identified another person in the Court. (VI-36)

Based upon this state of the testimony, defense counsel objected to the admission of Exhibits #34 and 35 on the grounds that these Exhibits were not relevant to the issues of the case. Counsel also objected due to the lateness of discovery. (VI-39) The Court ruled that the evidence was relevant and offered counsel a continuance until the following Tuesday because of the late discovery. (VI-43)

Based upon the Court's ruling, defendant Gutierrez and the United States Attorney stipulated that Exhibits #34 and 35 were kept in the ordinary course of business in order to avoid the necessity of calling any bank witnesses to testify regarding this aspect. (VI-58) The Court agreed and stated that by this stipulation, defendant Gutierrez

did not waive any objections as to the relevancy or lateness of discovery. (VI-59 and 66)

After the presentation of all evidence, and outside the presence of the jury, William L. Keating, co-counsel for defendant Gutierrez, testified as to the effect of the late discovery and admission of Exhibits #34 and 35 on the case. Mr. Keating testified that upon being notified of the existence of the Exhibits on Friday, February 11, 1977, he appeared at the office of the United States Attorney and also appeared before the Court for an unrecorded hearing regarding the admission of these Exhibits. After this hearing, Mr. Keating attempted to accompany the United States Attorney on an interview with potential witnesses at the National City Bank. The United States Attorney refused to permit Mr. Keating to accompany him. A copy of Exhibits #34 and 35 was provided to Mr. Keating on Friday, February 11, 1977 at 4:00 p.m. Mr. Keating testified that due to the lateness of the discovery of these Exhibits the defense was unable to adequately prepare any defense with regards to them. (VII-16)

ARGUMENT

THE VERDICT RENDERED BELOW MUST BE REVERSED DUE TO THE FACT THAT THE DISTRICT COURT ERRED IN ADMITTING AS EVIDENCE A CASHIERS CHECK REQUEST AND CASHIERS CHECK EXHIBITS #34 AND 35, OVER THE DEFENDANT'S OBJECTIONS AS TO:

A. LATENESS OF DISCOVERY.

B. RELEVANCY.

The Court of Appeals, by affirming the Trial Court's admission of the Cashiers Check Request and the Cashiers Check, has rendered a decision in direct conflict with the decision of the Ninth Circuit Court of Appeals in an almost identical case, *United States* v. *Estrada*, 441 F.2d 873 (9th Cir. 1971).

Further, the question of admissibility in this case presents an important question of interpretation of the new Federal Rules of Evidence, Rules 104 and 901.

Finally, the issue of lateness of discovery presents a question of the control of pre-trial discovery which calls for this Court to exercise its powers of interpretation and supervision regarding the Federal Rules of Criminal Procedure concerning discovery.

LATENESS OF DISCOVERY

On Friday, February 11, 1977, counsel for Gutierrez was notified of the existence of the Cashiers Check Request and the Cashiers Check, Exhibits #34 and 35. The existence of these items had only become known to the United States Attorney on February 10, 1977. An unrecorded hearing was held before Judge Sherman Finesilver, the Trial Judge, regarding the discovery and admissibility of these Exhibits and also concerning Gutierrez's Motion for Continuance, which was based on other grounds. After denying the Motion for Continuance, the Court indicated that it would withhold ruling on the defendant's objections as to the admissibility of the Exhibits until trial. At the suggestion of the Court, William Keating, co-counsel for Gutierrez, attempted to accompany the United States Attorney on an interview with potential witnesses at the National City

Bank in Denver concerning these Exhibits. The United States Attorney refused to let counsel accompany him. On February 11, 1977, at 4:00 p.m. the United States Attorney provided copies of the Exhibits to counsel.

On Friday, February 18, 1977, the fifth day of trial, the Court ruled that the Checks would be admissible. The government presented these Exhibits and rested its case. In a hearing outside the presence of the jury, Mr. Keating testified as to the prejudicial effect of the Exhibits upon the defense. Mr. Keating also stated that due to the lateness of the discovery, the defense was unable to adequately prepare any defensive strategy regarding these items.

Gutierrez declined the offer of a continuance until the following Tuesday which was offered by the Court as a result of its ruling concerning these items.

Pursuant to Local Rule 31, defense counsel and the United States Attorney met several months prior to the trial and complied with the requirements of Rule 16, Federal Rules of Criminal Procedure and specifically with Rule 16 (C) regarding the discovery and inspection of tangible objects which the government intended to use at the trial.

There is no issue raised here regarding the intentional or negligent failure of the government to provide discovery of these Exhibits. On the contrary, as soon as the United States Attorney was informed of the existence of these items he contacted counsel to advise him of this fact. However, the reasons for the lateness of discovery do not have any bearing on the impact of the late discovery upon the defense and the preparation of the defendant's case. The sole issue is whether the delivery of these items to the de-

fendant three days prior to trial was sufficiently prejudicial to warrant the granting of a continuance as permitted under Federal Rules of Criminal Procedure, Rule 16 (b) (1) and (2). Gutierrez had clearly indicated his desire for a continuance by the filing of a Motion for Continuance based upon the grounds.

There can be no question but that Exhibits ‡34 and 35 were of major importance in Gutierrez's prosecution. The Exhibits purported to show the transfer of $20,000 from Gutierrez to a party in Culiacan, Mexico during the time the conspiracy to distribute heroin was alleged to be in full bloom. There was testimony that Culiacan was the city from which the heroin was being obtained. These were the only items of physical evidence which purported to connect Gutierrez to any heroin trafficking.

Defendant Gutierrez contends that the record clearly displays the prejudicial effect of the admission of these Exhibits upon the preparation of his defense. This prejudice being apparent, the Court erred in failing to grant a continuance prior to trial to provide the defendant sufficient opportunity to adequately prepare a defense. See *United States* v. *Zammiello*, 432 F.2d 72 (9th Cir. 1970); *United States* v. *Lewis*, 511 F.2d 798 (D.C. Cir. 1975); *United States* v. *Padron*, 406 F.2d 561 (2d Cir. 1969); *United States* v. *Stabler*, 490 F.2d 345 (1974).

RELEVANCY

Exhibit 34 is a Cashiers Check Request presented to the National City Bank in Denver. The Request asks for a $20,000 check to be drawn payable to "Margarita Sandoval, Culiacan, Mexico." The signature of the purchaser is "Henry A. Gutierrez."

Outside of the presence of the jury, Pauline Mathias, the bank teller who prepared the check, was unable to identify the defendant Gutierrez as being the person who signed the Check Request. On the contrary, the witness identified another party in the courtroom as having been the person she saw present the Check Request.

No testimony was presented to the jury regarding the identity of the person who signed the Cashiers Check Request or paid for the Cashiers Check.

Also outside of the presence of the jury, Gordon Masterson, a Vice President and cashier at National City Bank testified that Exhibits ‡34 and 35 were kept in the ordinary course of business at National City Bank and were business records. Based upon this state of the evidence, Gutierrez stipulated, in the presence of the jury, that Exhibits ‡34 and 35 were kept in the ordinary course of business. This was done in order to avoid the necessity of recalling Mr. Masterson. However, Gutierrez specifically reserved his objection to the admission of the Exhibits because of lack of relevanvy.

In order for an item of evidence to have significance at the trial, it must be shown to be related to the material issue in the case. In the instant case, the only relevancy which the Cashiers Check Request and the Cashiers Check could have had to the case, would be to show that the defendant Gutierrez requested and paid for a $20,000 Cashiers Check which was to be paid to a person in Culiacan, Mexico. Therefore, in order for these Exhibits to be admissible, it must be made to appear that defendant Gutierrez did in fact request the Check to be prepared. However, the government presented no evidence of authorship of these Exhibits connecting them to Gutierrez.

Wigmore has pointed out the necessity of the showing of connection or authenticity.

> In short, when a claim or offer involves impliedly or expressly any element of *personal connection with a corporal object*, that connection must be made to appear, like the other elements, else the whole fails in effect. (Emphasis in the original) *VII Wigmore, Evidence*, §2129 at 564 (1970).

Rule 901 (a) of the Federal Rules of Evidence provides that the authentication and identification of evidence are aspects of relevancy.

> (a) *General Provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

The Advisory Committee Note to subdivision (a) sheds additional light on the need for this showing of relevancy.

> Subdivision (a): Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 VAND. L. REV. 344, 362 (1952); McCormick §§179, 185; Morgan, Basic Problems of Evidence 378 (1962). Thus a telephone conversation may be irrelevant because of an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." VII Wigmore §2129, p. 564.
>
> This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104 (b).

Rule 104 (b) states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Again, the Advisory Committee's Notes to Rule 104 (b) provide guidance in the interpretation of the Rule.

> *Subdivision (b).* In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact . . . if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy."

The theory and logic supporting the requirement of authentication and identification are discussed in Weinstein's Evidence, §901 (a) [02] at 901-18.

> Authentication and identification of Evidence are merely aspects of relevancy which are a necessary condition precedent to admissibility. See Rules 401-403 and compare Rules 104 (b), 602, 1008. Michael and Adler wrote:
>
> > We shall call this condition "the logical condition" of the admissibility of real proof. As we shall see the satisfaction of this condition depends upon

> the identification of the offered thing or event with one of the litigants in some way . . .

Wigmore also pointed out that authentication is "an inherent logical necessity." This view recognizes that no piece of evidence can have an intrinsic significance to a litigation; it must be related to a material issue in the case . . . In the absence of such a showing of authenticity or connection the evidence is simply irrelevant.

United States v. *Estrada*, supra, presents a case of striking similarity to the instant case. In *Estrada*, the Defendants Gary Shyne, Henry Estrada, Richard Robles and John Robles and other co-defendants were charged with conspiring to smuggle heroin into the United States. Testimony indicated that the defendants purchased the heroin from a supplier in Mexico named Robert Hernandez.

Over the defendant's objections, the government introduced Money Orders payable to Hernandez and variously signed, "Gary Shyne" or "Henry Estrada," or "Richard Robles."

The government's handwriting expert could not identify the handwriting on the money orders by defendant Shyne. Nor, did the government offer sufficient evidence to show that Estrada or Richard Robles were the persons who signed the Money Orders which had their names on them.

Ruling on the admissibility of the Money Orders against Shyne, Estrada and Richard Robles, the Court held,

> Over objection, the Government introduced Money Orders payable to Hernandez and variously signed

> "Gary Shyne" or "Henry Estrada" and on Money Order similarly payable, signed "Richard Robles." The Government's handwriting expert could not identify the handwriting on the Orders signed "Gary Shyne" . . . No circumstantial evidence was offered to connect Estrada to the writer of the letter or to the signatory of the Money Order . . . There was no evidence that defendant Richard Robles wrote the signature on the Money Order . . .

None of these Money Orders was admissible, because the Government failed to lay the requisite foundation by proof of its authenticity. To lay the foundation, the Government had to introduce evidence sufficient to sustain a finding that each of the Money Orders was signed by the person against whom the documents were sought to be admitted. (Citations.) The Government produced neither direct nor circumstantial evidence to authenticate the writings.

Error in admitting the challenged Money Orders was not harmless.

The Court did, however, a[illegible] of the admission of seven Cashiers Checks against [illegible]efendant, John Robles. The Court's ruling pr[illegible] guidance as to the type of evidence, direct and [illegible]cumstantial, which will support the admission of this type of evidence.

John, next assigns as error the introduction of four of seven Cashiers Checks offered against him. A bank teller testified that John purchased three of the checks from her. The Bank's records indicate that John purchased all seven checks. On two of the checks the address listed for the purchaser is the same as that of

the address where John was arrested. A receipt for one of the questioned checks was found in the search of John's home. The direct and circumstantial evidence adequately supplied the foundation for the admission of all of the Checks.

It is of interest to note that Senior Judge Alfred Murrah, of the Tenth Circuit, sat by designation on the panel which decided *Estrada* and joined in the unanimous decision.

Judge Murrah authored a similar decision several years later in *United States* v. *Wagner*, 475 F.2d 121 (10th Cir. 1973).

The *Wagner* case also involved a drug conspiracy charge. The only independent evidence tying Wagner to the conspiracy was the endorsement of his name on the back of a co-conspirator's check.

In reversing Wagner's conviction, the Court held that the testimony was insufficient to show that Wagner was the author of the endorsement signature on the Check. This being the case, the Check was not admissible as evidence against him.

See also *United States* v. *Duncan*, 503 F.2d 1021, (10th Cir. 1974). In *Duncan*, the Court of Appeals upheld the Trial Court's refusal to admit a document offered by the defendant as being exculpatory because the defendant's witness was unable to identify the handwriting in the Exhibit as being that of its purported author.

The Court in *United States* v. *American Radiatory and Stand. San Corp.*, 433 F.2d 174 (3rd Cir. 1970), held

that the weight of authority requires that a prima facie case of the alleged author's identity must be established for the documents to be admitted. (See *American Radiator* for a further example of the type of proof, direct and circumstantial, which is sufficient to warrant admission of documents.)

In the instant case, the Government presented no evidence, either direct or circumstantial, to show that Gutierrez was in fact the author of Exhibits ‡34 and 35 or was in anyway connected with them.

The fact that Ruybalid allegedly claimed that the heroin came from Culiacan, Mexico and the Check was directed to one Margarita Sandoval, Culiacan, Mexico, is not sufficient evidence of authorship; as it was not sufficient evidence in *Estrada* where the Checks were directed to Hernandez, who was purported to be the supplier in Mexico.

There is nothing in the writings themselves which provides any circumstantial evidence tying the Exhibits to Gutierrez. There is no information in the Exhibits which would be known only to Gutierrez. In fact, the name Margarita Sandoval was not mentioned in any testimony as being connected to any alleged heroin trafficking.

Based upon this state of the record, it was error for the Court to admit Exhibits ‡34 and 35.

CONCLUSION

This Court should grant certiorari and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A.

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 77-1304 and 77-1305

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HENRY ANSELMO GUTIERREZ, EDWARD JOSEPH ZAMORA, Defendants-Appellants.	Appeal from the United States District Court for the District of Colorado (D.C. No. 76-CR-276)

Richard N. Stuckey, Assistant United States Attorney (Joseph F. Dolan, United States Attorney, on the brief) for Plaintiff-Appellee.

William L. Keating of Fogel, Keating and Wagner, Denver, Colorado (George F. Martens, on the brief) for Defendant-Appellant Gutierrez.

Kevin P. Kubie, Denver, Colorado, for Defendant-Appellant Zamora.

Before BARRETT, DOYLE and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

The Gutierrez appeal, No. 77-1304.

Gutierrez and Zamora, defendants-appellants herein, seek reversal of judgments of conviction resulting from jury verdicts of guilty based on an indictment which charged that they, together with others, did knowingly and willfully conspire to commit offenses against the United States, arising under 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2, the purpose of the conspiracy being to knowingly and intentionally distribute quantities of a Schedule I narcotics controlled substance — heroin.

In Counts IV and V Gutierrez was charged, together with others, with knowingly and intentionally distributing a controlled substance, approximately five ounces of heroin, a Schedule I narcotic controlled substance, in violation of 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2. Gutierrez was found guilty of violating Count V. He was found not guilty as to Count IV.

Other alleged co-conspirators were Edward Joseph Zamora, who also seeks review and reversal of his conviction under the conspiracy count, Anthony L. Murillo, Mose Anthony Trujillo, James Orlando Quintana and Isaac Abram Ruybalid. Of these, Zamora alone has appealed.

Neither of the defendants-appellants nor any of their co-conspirators testified at trial.

The dates set forth in the conspiracy count of the indictment span the period from May, 1976 to October 6, 1976. The substantive offense in which Gutierrez is charged, namely Count V, is alleged to have occurred on September 29, 1976. This was a transaction in which Gutierrez actively took part.

The points which are advanced by Gutierrez are, *first*, that the evidence was insufficient to establish his participation in the conspiracy. His more specific complaint is that the proof was insufficient to establish that he was engaged in a conspiracy with the individuals whose statements inculpatory of Gutierrez were offered and received in evidence. He claims that these statements are hearsay and incompetent.

One of the major questions in the case is the adequacy of basic proof to establish that the relationship between Gutierrez and the pushers or sellers of the narcotic was such that the statements of the latter such as Murillo and Ruybalid made to undercover agent Vigil were binding on Gutierrez.

A second point on behalf of Gutierrez involves the admission into evidence of certain exhibits, samples of heroin, which were purchased by government agents from Murillo, Ruybalid, Vigil (not the agent) and others. The objection here is that the time lag between the purchase of the sam-

ples and the testing was substantial and that there was a failure of proof as to safeguards in storing or keeping safe.

Gutierrez also objects to the receiving in evidence of the testimony of Agent Duran regarding the organizational scheme of narcotics trafficking ring and the specific positions of Gutierrez and Zamora in such an operation.

Gutierrez further challenges the receipt in evidence of a cashier's check purchased from a local bank by one Henry A. Gutierrez in the amount of $20,000. The purpose of this being offered and its being received in evidence is to show that appellant Gutierrez sent this check to a town in Mexico in order to pay for heroin which was purchased in that particular town. It is claimed that the check was proven up incompetent because appellant Gutierrez was not identified as the purchaser, and also this evidence was not developed until just a few days prior to trial. The potentially meritorious question is, however, whether the check was adequately authenticated.

The questions tendered on behalf of Zamora are, *first*, whether the evidence as to Zamora's participation in the conspiracy was sufficient to support the jury's verdict and, *secondly*, whether the court abused its discretion by allowing the narration by the Agent Duran of certain videotape evidence having to do with his monitoring the delivery of heroin. (In the course of his monitoring, the agent identified Zamora as being in the near vicinity of the dropped heroin and also depicted him as protecting the heroin which had been dropped previously.)

I.

WAS THE EVIDENCE INSUFFICIENT TO JUSTIFY THE GUILTY VERDICT AGAINST GUTIERREZ IN THE CONSPIRACY CASE?

We hold that it was. It is to be noted that the alleged conspiracy extends to a number of individuals, including James Quintana and Isaac Ruybalid, both of whom are at large. Anthony Murillo and Mose Trujillo have entered guilty pleas on counts other than those connected with Gutierrez and the appellant Edward Joseph Zamora.

Much of the government's evidence was presented through undercover agent Michael Vigil, who made several purchases from Anthony Murillo and Isaac Ruybalid. Undercover agent Vigil also had dealings with Fidel Ramos and Sye Vigil.

On July 9, 1976, Vigil purchased one-half ounce of heroin from Anthony Murillo and Mose Trujillo.

On July 12, 1976, agent Vigil purchased one ounce of heroin from Anthony Murillo.

On July 17, 1976, Vigil purchased five ounces of heroin from Anthony Murillo. Following this sale, Ruybalid and Quintana were seen by the surveillance officers in the company of Anthony Murillo and were observed counting a substantial quantity of money.

On July 22, 1976, agent Vigil purchased eight ounces of heroin from Anthony Murillo.

On July 31, 1976, Vigil purchased one ounce of heroin from Anthony Murillo.

Counsel for Gutierrez emphasize that he was not involved in any direct dealings, although they concede that his alleged co-conspirators, pushers or sellers, identified to Vigil appellants Gutierrez and Quintana as the source of the heroin.

Vigil testified that on August 19 and 20, he met with Ruybalid, and on August 25, 1976, he purchased one ounce of heroin from Ruybalid.

On August 26, 1976, he purchased two ounces of heroin from Ruybalid.

On September 3, 1976, he purchased one ounce of heroin from Ruybalid. He was told by the latter that Edward Joseph Zamora was the source of this heroin.

Agent Vigil observed Ruybalid meeting with Zamora contemporaneously with the August 26, 1976 and September 3, 1976 purchases. He also saw him meeting with Zamora on September 7, 1976, when Ruybalid sold one ounce of heroin to Vigil.

The several samples of heroin sold to Vigil on the various dates mentioned above were admitted into evidence.

Both Murillo and Ruybalid, according to agent Vigil, repeatedly identified Quintana and Gutierrez. They were said by the sellers to be the source of their supply of heroin. Also, it was Murillo who introduced Ruybalid to Vigil on August 20, 1976. Ruybalid stated that Quintana and Gutierrez were his *partners*. Also, Vigil had observed Ruybalid on August 21, 1976 driving a 1975 Pontiac Grand Prix, which he had seen Henry Gutierrez driving on numerous occasions and which he had observed in the vicinity of Henry Gutierrez's residence at 375 Meade Street, Denver. Ruybalid stated that he had been loaned this car by one of his partners and that this car was used in their business.

There is one significant transaction (from the standpoint of proof of the conspiracy) in which Quintana and Gutierrez were involved. That commenced on August 23, 1976, at a tavern. Vigil actually met Quintana and Gutierrez and these men questioned Vigil about his contacts in New Mexico and other information designed to check his authenticity as a buyer of heroin. Following his discussions with Gutierrez and Quintana, Ruybalid said that his partners had given him permission to go ahead with the proposed heroin transaction with Vigil. We view this conversation between Quintana, Gutierrez and Vigil and the statement by Ruybalid to Vigil concerning going ahead with the transaction as part of a single transaction. Thus, the statement of Ruybalid that he had been told to go ahead with the transaction with Vigil is part of the *res gestae* and thus it is not necessary to rely on statements of co-conspirators in order for this evidence to be received. Rule 803 (1) and (2), Rules of Evidence .

Two days after this incident, Vigil met with Ruybalid and completed a purchase of heroin. On the day of the transaction in question, Gutierrez was observed by a government agent going to Ruybalid's home as part of the transaction.

There is a sale involving Quintana and Gutierrez during this same period. On September 23, 1976, Vigil talked with Ruybalid about the transfer of some stolen diamond rings for heroin. A meeting was arranged between Vigil,

Quintana and Ruybalid at Gutierrez's residence. Vigil offered to trade the diamonds for heroin, but Gutierrez refused to do so because they were too small. Quintana also rfused to accept the rings because of the diamonds' lack of value. However, there was a continuation of this transaction on September 28, 1978, when Vigil contacted Ruybalid again about the diamond ring transaction. The diamonds were displayed on the September 28, 1976 occasion, but Quintana was not present, and Gutierrez said that Quintana would have to look at the diamonds and determine what quantity of heroin would be given for them.

The next day, September 29, 1976, according to Vigil, he, in the company of Ruybalid, went to 1326 Kalamath Street, the home of Quintana's parents, and there met Quintana and Gutierrez in an attempt to complete the heroin-diamond transaction. Both Quintana and Gutierrez, together with Ruybalid, and also the diamonds, were present at this Kalamath Street meeting. Gutierrez then examined the diamonds with the jeweler's glass and a measuring instrument. Gutierrez was told that the diamonds had been removed from the original mountings. Quintana also examined them. While looking at the diamonds, Gutierrez asked whether the diamonds had been removed from the mountings and Vigil said "yes," so that they would be difficult to identify. Quintana asked if the diamonds were from New Mexico, and Vigil said "yes." There was a good deal of conversation with Quintana as to the value of the diamonds. Quintana finally said, according to Vigil, that 15 ounces of heroin would be given for the diamonds plus $10,000 in cash. The diamonds were handed to James Quintana. Later Vigil met Ruybalid at a bar and went from there to some apartments in West Denver. Ruybalid said that he had the heroin and he was ready to

complete the transaction. Ruybalid said that Quintana and Gutierrez had liked the diamonds and that Quintana had kept four and given Gutierrez one. The heroin was delivered and the money was passed.

On October 6, an effort was made to purchase two pounds of heroin from Ruybalid for $24,500. The money was actually shown to Ruyablid, but this transaction was not completed.

The presence of Gutierrez during at least part of the conversation which were had in connection with the trade of diamond rings for heroin, together with the fact that the transaction was completed, unquestionably serves to identify Gutierrez as a member of the conspiracy for the purpose at least of the receipt of statements of Murillo and Ruybalid. The meeting a few days prior to that at the bar with Gutierrez and Quintana and the detailed discussions as to Vigil's personal connections, followed by the fact that Ruybalid completed the transaction and said immediately after in private discussions with Gutierrez and Quintana that they, as his partners, had given him permission to proceed, supports the proposition that Gutierrez belonged to the conspiracy so as to justify the court's allowing the jury to consider the extrajudicial statements of Ruybalid and Murillo. Also, the testimony of the agents who had Gutierrez under surveillance furnished circumstantial evidence of his membership, as does the evidence that his automobile was used in the transaction of business on behalf of the conspiracy.

The prior statements by a witness are admissable and are said not to be hearsay in § 801 of the Rules of Evidence. That section (Rule 801 (d) (2)), provides in pertinent part:

(d) Statements which are not hearsay. A statement is not hearsay if—.

(2) Admission by party-opponent. The statement is offered against a party and is * * * (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The more frequent application of this rule is in relationship to a coconspirator. The declaration of one during the period when the conspiracy is going on is admissable against another co-conspirator provided there is sufficient showing by independent evidence of a conspiracy between the declarant and one or more other defendants, and the declaration is made in furtherance of the conspiracy. *See United States* v. *Pennett*, 496 F.2d 293 (10th Cir. 1974). Unquestionably, the statements here were made in furtherance of the conspiracy and the only problem is whether there is adequate independent evidence for the existence of a conspiracy between the declarant and the defendant. *United States* v. *Nixon*, 418 U.S. 683 (1974).

There was sufficient independent evidence of the existence of a relationship, whether you call it co-conspirator, agency or partnership, so that statements made by Murillo and Ruybalid were admissable against Gutierrez. *See United States* v. Krohn, —— F.2d —— (10th Cir., filed April 3, 1978).

II.

WAS IT ERROR FOR THE COURT TO RECEIVE THE SAMPLES OF HEROIN WHICH WERE PURCHASED BY VIGIL FROM MURILLO AND RUYBALID?

We conclude that it was not error. Here, as in connection with the extra-judicial statements made by the agents to Vigil, the question is whether in making the sales reflected by the samples the sellers were acting on behalf of Gutierrez, so it is a matter of whether the evidence supports a conclusion that these men were agents or partners, as was claimed by Ruybalid of Gutierrez. Having concluded that this was a heroin enterprise which supplied a great amount of the drug and that Quintana and Gutierrez were the leaders of it, it would follow pretty much axiomatically that the sellers were acting on behalf of these two. There is specific evidence in the form of meetings between Gutierrez, Quintana, Vigil and Ruybalid, the latter who was introduced to Vigil by Murillo, that this involved a relationship or partnership in comr or an agency or conspiracy, so that the sales were on behalf of Gutierrez (and Quintana). Once you conclude, of course, that there was such a relationship, the statements of the agents are admissable for the purpose of corroborating the existence of the conspiracy and for the purpose of proving the substantive offenses charged.

It is also claimed by the defendants that the subject exhibits, samples of heroin purchased by undercover agents and subsequently tested at the DEA laboratory in Dallas, Texas, were inadmissable because the testing was delayed

seven to 49 days after mailing from Denver. Objection is also registered as to the failure to show the procedures used for safekeeping or for storage of the evidence. Also claimed is a lack of evidence to show a chain of custody.

There is no claim of tampering nor is there any evidence that raises a real question about whether the drugs were mailed directly to the testing laboratory. Nor is there shown a break in the chain of custody. Hence, we see no basis for this objection.

As was said in *United States* v. *Freeman*, 412 F.2d 1181, at 1182-83 (10th Cir. 1969):

> The matters relating to the chain of possession of the tablets from agent Bullock to the chemist and back relate only to the weight to be given the testimony of the chemist. In the final analysis, the verdict depended on whether the jury believed agent Bullock or the defendant.

III.

WHETHER THE COURT ERRED IN ALLOWING THE TESTIMONY OF AGENT DURAN IN RESPECT TO ORGANIZATIONAL SCHEME OF A NARCOTICS TRAFFICKING RING, INCLUDING HIS OPINIONS AS TO THE POSITIONS OF GUTIEEREZ AND ZAMORA IN THE OPERATION.

At first glance, the point here advanced was a cause of concern to us because it came through as a situation in

which a witness had been allowed to testify to conclusory matters approaching the giving of opinions as to guilt or innocence. Further examination, however, revealed that the witness Alejandro Duran, a DEA agent, had been called by the government for the limited purpose of describing his participation in investigative surveillance of appellants and their co-conspirators. It was on cross-examination that counsel for Gutierrez asked Duran numerous detailed questions, first, regarding the organizational structure of the DEA and then the meaning of various terminology used by narcotics violators. Indeed, he was asked questions about heroin rings, including the one in the case at bar. He was even asked about the personnel and leadership. This was an apparent effort by defense counsel to establish that the members of the DEA group believed in the guilt of the defendants and were thus prejudiced. It was only after this testimony that clarifying questions were asked by the government. Duran testified to his qualifications as an agent and he went on to state that it was not unusual for the leaders of a drug ring to insulate themselves from direct contact with the sale of narcotics. He characterized Gutierrez as a leader of the ring and Zamora as a "drop man."

Were it not for the fact that the defendant by cross-examination expanded the scope of the testimony of the witness Duran, we would have to conclude that the questions asked and answers given were prejudicial, for it is not permissible to have a witness comment on the testimony or to give conclusions which result in testifying as to the ultimate questions which the jury is called upon to answer.

It is true that Rule 704, the relevant Rule of Evidence, does recognize that on occasion the ultimate issue to be decided by the jury can be touched by opinion evidence. Cau-

tion should be the watchword in receiving such evidence in criminal cases. It is the extraordinary circumstances shown here that persuades us that receipt of this testimony was not prejudicial.

IV.

DID THE TRIAL COURT ERR IN RECEIVING IN EVIDENCE A CASHIER'S CHECK IN THE AMOUNT OF $20,000, PURCHASED FROM A LOCAL BANK BY ONE HARRY A. GUTIERREZ?

A few days before the trial was to begin, the government notified defense counsel that a cashier's check in the amount of $20,000, together with a cashier's check request, had come to its attention. The check was made payable to Margarita Sandoval in Culiacan, Mexico. Appellant Gutierrez stated at the time that he would object to receipt in evidence of this check on the ground of lateness and relevancy. The trial court denied the pretrial request for continuance, but reserved a ruling as to admissibility until the evidence was offered at trial.

A *voir dire* hearing was held in chambers. The teller who prepared the check was unable to positively identify the appellant Gutierrez as the purchaser of the check. She testified, however, that the purchaser was polite, well groomed, and wore "very pretty" gold rings. The check was paid through regular banking channels and records of the transaction were kept in accordance with standard banking practice.

The question of authentication of this check is somewhat difficult because there is not a positive identification

of the purchaser. It is not, of course, essential that there be positive evidence in every instance in order to authenticate a document such as the cashier's check which we have before us. It can be accomplished by circumstances. Yet it is a factor when considered in conjunction with the fact that Ruybalid told Vigil on a number of occasions that the source of the heroin which was being furnished to him was in Culiacan, Mexico, the place where the check was sent. Ruybalid also told Vigil that Quintana would usually send Gutierrez to pick up the narcotics at Culiacan, Mexico. It is not, of course, a daily occurrence to have a cashier's check of the magnitude sent to Culican, Mexico, by a person having an unusual name like Henry A. Gutierrez. Moreover, we cannot disregard the fact that Gutierrez by now has been proven to be a senior partner in this narcotics enterprise. All in all, we would say that the trial court acted within its discretion in receiving the evidence.

The question remains whether the check was relevant. Here the totality of the evidence with respect to the magnitude of this enterprise, including the evidence that the heroin came from Mexico, justified the receipt in evidence of the check as bearing on the question whether Gutierrez was guilty of conspiracy by paying the purchase price for the heroin.

Federal Rules of Evidence, Rule 901 (b) (4), authentication, or identification looking to admissibility, is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Illustrations are given in subsection (b) in Rule 901, including "appearance, content, substance, internal patterns or other distinctive characteristics taken in conjunction with circumstances."

The action of the trial court in receiving this document was within both the letter and the spirit of this rule.

V.

DID THE COURT ERR IN DENYING GUTIERREZ'S MOTION FOR SEVERANCE FROM ZAMORA, WHICH MOTION WAS TENDERED THE MORNING OF THE TRIAL?

In support of his severance request, the argument was made that Zamora, if severance were allowed, would testify in favor of Gutierrez. He says that severance was mandatory because it was impossible for him to receive a fair trial without Zamora's testimony. The problem with this is that no positive assurance was or could be given that Zamora would have testified. In any event, the question is whether or not failure to grant the severance will result in prejudicial testimony against one defendant which is inadmissible against the joint defendant, here Gutierrez. Is it prejudicial to the point that it requires that the case be severed?

Rule 14 of the Federal Rules of Criminal Procedure answers this question. It provides that:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

This ordinarily contemplates the positive evidence against one defendant which is prejudicial to the other.

Defendant seeks to turn this around so as to grant a severance in order to free the codefendant to testify favorably toward him. The answer to this is that he is free to testify favorably in an exculpatory way in the joint trial if he chooses to do so. Therefore, we fail to perceive prejudice.

A further reason for upholding the trial court in this ruling, in addition to the fact that Zamora's testimony was the merest of possibilities, was the fact that Zamora would either have to be convicted or acquitted first in order to be free to exculpate Gutierrez. If Gutierrez were to be tried first in a severance situation, it would be impossible for Zamora to testify without inserting his own head into the noose.

* * * * *

In sum, the testimony in support of the convictions of Gutierrez was more than sufficient despite the fact that only a small part of it was direct evidence. The circumstances, however, were extensive and supportive.

As to the trial rulings, with the exceptions noted, the trial was virtually errorless. As to the rulings of which we have shown some disagreement, we do not agree with defendant Gutierrez that they were prejudicial.

The Zamora appeal, No. 77-1305.

The Zamora case is different from the Gutierrez case in that Zamora, according to the government's theory, occupied a different position in the enterprise. The govern-

ment's evidence shows that he made deliveries or "drops", as they are called. Also, he would remain until the delivery was completed. The Zamora case also differs in that there is a comparative dearth of evidence showing Zamora's direct participation in sales. There was evidence produced by videotape which showed him to be at or near the scene of the delivery of heroin.

I.

The main question as to Zamora is then whether the evidence was legally sufficient to establish that he was part of the conspiracy.

Zamora was identified with some of the same series of sales that we have already considered. On July 31, 1976, Vigil purchased an ounce of heroin for $1,000 from Murillo. The transaction occurred near Sloan's Lake in Denver and was observed by surveillance officers. Prior thereto, Ruybalid drove to 1339 Knox Court, the residence of Edward Zamora, and then met Murillo near Zamora's home. Soon thereafter, Zamora approached the Murillo truck, placed his right hand on the passenger window and walked around the truck and entered the Ruybalid car. This was shown to the jury by videotape. After this, Zamora and Ruybalid drove away. Vigil took delivery of the heroin at Sloan's Lake.

In late August 1976, Vigil was introduced (as we have previously noted) to Ruybalid. Ruybalid was the one, it will be remembered, who introduced Vigil to Quintana and Gutierrez. In connection with the discussion of drug transactions, Ruybalid told Vigil that he disliked any direct connection with heroin. He said that his partners had taught

him well on this. He explained that a person by the name of "Eddie" made the actual deliveries of heroin for him as a "drop man." Vigil testified that Eddie was in fact Zamora.

It was Ruybalid's practice to place the agreed quantity of heroin at a certain location for pickup later by the purchaser. On September 3, 1976, following the negotiations which preceded a delivery, Vigil was riding with Ruybalid in the latter's automobile to pick up the heroin that he had purchased. As they reached the vicinity of the pre-arranged drop location, Vigil saw Zamora standing across a gully by his, Zamora's, automobile. He was waving his arms at them. Ruybalid stopped his car and told Vigil that the heroin should have been placed near Zamora's location, but the presence of two teenage boys in the immediate area might be the reason for its not being there. At this time Ruybalid and Zamora entered their vehicles. Ruybalid drove a short distance to where Zamora was parked and they both left their vehicles and had a conversation. When Ruybalid returned he told Vigil that the person in the other vehicle worked for him and had placed the heroin at that location earlier. Two teenagers had seen him, had picked up the package and had run away with it. Zamora recovered the heroin after a chase, and eventually Ruybalid made the actual delivery of heroin directly to Vigil. Most of this episode, including Zamora's actions, were recorded on the videotape and was shown at the trial.

The surveillance agents testified that on at least two additional occasions Zamora was seen in the immediate vicinity of heroin drops just before the transfer was to be made. On these occasions he promptly departed the area once the pickup was completed. In addition, Zamora was frequently seen meeting with Ruybalid and other conspira-

tors both before and after heroin transactions were completed.

Zamora contends that the inculpatory statement by Ruybalid regarding his being a "drop man" was actually inadmissible in the absence of solid proof that a conspiracy existed. He contends that the evidence against him consists of his being merely present at the scene of the crime. We must disagree. Thre was much more than mere presence. In many, if not all of the transactions, a delivery was made in a similar way. It was in an empty cigarette package and it would be under some object such as a trash can. It is to be inferred that the reason for Zamora's remaining at the scene was to protect the material which he had placed for pickup. In connection with the transaction described above, he pursued some teenagers and recovered heroin which they had taken.

We are not saying that it is a powerful case. We are saying that the evidence is sufficient to justify the introduction of the extrajudicial statement of Ruybalid in explanation of Zamora's function.

II.

The final point urged by counsel for Zamora is that the court erred in allowing agent Alejandro Duran to narrate the videotape of September 3, 1976. During the course of the trial the government was allowed to show several surveillance videotapes to the jury. Counsel stiplated to the admission of these and agreed to allow agent Duran to narrate the videotapes and explain to the jury when and where they were taken and to identify the people seen in the videotaps. It is claimed, however, with respect to the

September 3, 1976 tape, that Duran was allowed to state more than counsel had agreed upon. He was allowed to give detailed descriptions of the events as they were happening. The record does not bear this out. In the few instances in which the narration exceeded the boundaries, the trial court took action to stop any expansion. We are unable to agree that the trial court abused its discretion or that defendant suffered prejudice.

The judgment as to Zamora is affirmed.

APPENDIX B.

MAY TERM — June 30, 1978

Before The Honorable Oliver Seth, Circuit Judge
The Honorable William J. Holloway, Jr., Circuit Judge
The Honorable Robert H. McWilliams, Circuit Judge
The Honorable James E. Barrett, Circuit Judge
The Honorable William E. Doyle, Circuit Judge
The Honorable Monroe G. McKay, Circuit Judge
The Honorable James K Logan, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HENRY ANSELMO GUTIERREZ,

Defendant-Appellant.

No. 77-1304

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellant on May 18, 1978.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Barrett, Doyle and Logan to whom the appeal was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, CLERK

No. 78-198

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY ANSELMO GUTIERREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 576 F. 2d 269.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. A petition for rehearing was denied on June 30, 1978 (Pet. App. B). On July 31, 1978, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including August 3, 1978. The petition was not filed until August 4, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by the district court's refusal to grant a continuance before trial.

2. Whether the district court erred in admitting into evidence a cashier's check and cashier's check request form that had been authenticated by circumstantial evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and distributing heroin, in violation of the same statutes.[1] He was sentenced to concurrent terms of four and a half years' imprisonment on each count, followed by a special parole term of six years. The court of appeals affirmed (Pet. App. A).

1. The evidence at trial showed that on July 8, 1976, Michael Vigil, an undercover agent of the Drug Enforcement Administration, met with co-conspirator Anthony Murillo and indicated that he wanted to purchase some heroin (III Tr. 24-30, 39-41). The following day Agent Vigil purchased a balloon containing heroin from Murillo and co-conspirator Mose Trujillo. Murillo stated that his suppliers were petitioner and co-conspirator James Quintana (III Tr. 42-46). During this and subsequent drug transactions, Murillo repeatedly indicated to Agent Vigil that his suppliers, petitioner and Quintana, were from New Mexico (III Tr. 42, 48-50, 56-57, 69). On August 20, 1976, Murillo introduced Agent Vigil to co-conspirator Isaac Ruybalid. Ruybalid later introduced Agent Vigil to his partners, petitioner and Quintana (III Tr. 74-76, 87-88). Petitioner became involved in negotiations with Agent Vigil concerning a transaction in which Vigil would exchange cash and stolen diamond rings for heroin. Agent Vigil ultimately exchanged five diamonds and $10,000 for 15 ounces of heroin. Ruybalid stated that petitioner and Quintana obtained their heroin from a source in Culiacan, Mexico (III Tr. 124-138, 143-153).

[1] Petitioner was acquitted on a second distribution count.

2. On February 10, 1977, the government learned of a cashier's check and check request form, both of which were signed "Henry A. Gutierrez." The check, in the amount of $20,000, was made payable to Margarita Sandoval, Culiacan, Mexico. On February 11, 1977, the government notified defense counsel of the existence of the check and check request form. The government supplied defense counsel with copies of both items. Petitioner immediately moved for a continuance. The district court denied the motion because it had not yet determined the admissibility of the check and request form. Trial began on Monday, February 14, 1977, as scheduled. The check and request form were presented to the court on Friday, February 18, 1977, at a hearing outside the presence of the jury. The court decided to admit the check and request form and offered defense counsel a continuance to the following Tuesday. Defense counsel declined the offer (VII Tr. 43, 61; Pet. 6-11).

ARGUMENT

1. Petitioner asserts (Pet. 10-12) that the district court erred in refusing to grant a continuance before trial following the late discovery of new evidence. He maintains that the denial of the continuance deprived defense counsel of the opportunity adequately to prepare a defense. This contention is not supported by the record.

As soon as the Assistant United States Attorney received the cashier's check and check request form, he informed defense counsel of the new evidence against petitioner and provided copies thereof. The prosecutor was not obligated to make such a pretrial disclosure either under the Constitution (see *Weatherford* v. *Bursey*, 429 U.S. 545, 559-561 (1977)) or by statute (see Fed. R. Crim. P. 16). Since the prosecutor was free to wait until trial to produce the new evidence against petitioner, it follows that petitioner was not entitled to a pretrial continuance.

Moreover, between the date he was given notice of the evidence and the actual presentation of the evidence at trial a week later, defense counsel had ample time to interview witnesses and otherwise investigate the facts concerning petitioner's alleged signature on the cashier's check. Defense counsel conducted no such investigation. Nor did he take advantage of the continuance offered by the district court during trial to afford him more time to prepare a defense. Petitioner has not identified any way in which he was prejudiced by the district court's failure to grant a continuance before trial. Likewise, he has not explained why the district court's offer of a continuance during trial was not the functional equivalent of the continuance requested earlier. In these circumstances, even assuming petitioner had some colorable claim to consideration of a continuance, the district court did not abuse its discretion in postponing the proposed continuance until after the court's decision on the admissibility of the check and check request form. See *United States* v. *Taylor*, 542 F. 2d 1023 (8th Cir. 1976), cert. denied, 429 U.S. 1074 (1977); *United States* v. *Anderson*, 509 F. 2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975).

2. Petitioner further contends (Pet. 12-19) that the district court erred in admitting into evidence the cashier's check and request form. He argues that the documents were not properly authenticated and were not relevant. These essentially factual arguments do not merit review by this Court. In any event, the court of appeals correctly concluded that neither objection is well-founded (Pet. App. 34-36).

In response to petitioner's assertion that the check should not have been admitted because the bank teller could not positively identify him as its purchaser, the court accurately observed (Pet. App. 35):

> It is not, of course, essential that there be positive evidence in every instance in order to authenticate a document such as the cashier's check which we have before us. It can be accomplished by circumstances.

See, *e.g.*, *United States* v. *Wilson*, 532 F. 2d 641, 645 (8th Cir.), cert. denied, 429 U.S. 846 (1976); *United States* v. *Lacopelli*, 483 F. 2d 159, 162 (2d Cir. 1973); *United States* v. *American Radiator and Standard Sanitary Corp.*, 433 F. 2d 174, 192 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); *United States* v. *Sutton*, 426 F. 2d 1202, 1207 (D.C. Cir. 1969).

The Federal Rules of Evidence reject the common law prejudice against self-authenticating documents. Rule 902(9) provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to * * * [c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law." Section 3-307(1)(b) of the Uniform Commercial Code, in turn, provides that "[w]hen the effectiveness of a signature is put in issue * * * the signature is presumed to be genuine or authorized * * *." Moreover, Fed. R. Evid. 901(a) states

that, even where extrinsic evidence of authenticity is required, the requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." By way of illustration, Rule 901(b)(4) provides that the requirement may be satisfied by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances."

Here, the bank teller's testimony describing the purchaser of the check, as recounted by the court of appeals (Pet. App. 34), was consistent with petitioner's general description. The cashier's check for $20,000 was signed with petitioner's name. Petitioner's name was also on the check request form. The check was sent to Culiacan, Mexico, the place that Ruybalid had identified as the source of the heroin he and his partners distributed. Ruybalid told Agent Vigil that "Quintana would usually send [petitioner] to pick up the narcotics at Culiacan" (Pet. App. 35). Other evidence established that petitioner was Murillo's supplier of heroin. Taken together, these circumstances were "sufficient to support a finding" that the check was authentic (*ibid.*). Petitioner presented no contrary evidence. In this situation, the district court properly ruled that the check's admission was not barred on authenticity grounds.[2]

[2] *United States* v. *Estrada*, 441 F. 2d 873 (9th Cir. 1971), on which petitioner relies, does not support his position. That case simply held, after a close factual review of the record, that the government had not produced sufficient direct or circumstantial evidence to authenticate the writings at issue. The case was decided four years before the effective date of the Federal Rules of Evidence and has no precedential value in connection with the different facts presented here. *United States* v. *Duncan*, 503 F. 2d 1021 (10th Cir. 1974), and *United States* v. *Wagner*, 475 F. 2d 121 (10th Cir. 1973), are likewise inapposite. In *Duncan* the document was excluded because the proponent's witness could not identify the handwriting contained therein, and the document was not authenticated in any other way; in *Wagner* the evidence was excluded because the handwriting comparison exemplars had not been authenticated.

Once the government had sufficiently established the authenticity of the documents, their relevance was readily apparent. As the court of appeals noted (Pet. App. 35):

> [T]he totality of the evidence with respect to the magnitude of this enterprise, including the evidence that the heroin came from Mexico, justified the receipt in evidence of the check as bearing on the question whether Gutierrez was guilty of conspiracy by paying the purchase price for the heroin.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

DOJ-1978-10